FOR ARGUMENT

In The

Supreme Court of the United States

October Term 1976

No. 75-1861

GORDON G. PATTERSON, JR.,
Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the
New York Court of Appeals

REPLY BRIEF FOR THE APPELLANT

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Daily Record Corporation
Rochester, New York
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Spaulding Law Printing
Syracuse, New York

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ARGUMENT

POINT I

Appellant's Conviction Must Be Reversed Since The Decision Of This Court In *Mullaney v. Wilbur* Requires That Where The Presence Or Absence Of The Mitigation Factor Is Critical To The Murder-Manslaughter Dichotomy The Persuasion Burden Must Be Placed Upon The State.

The Respondent* contends that "... the statutory scheme invalidated in *Mullaney* clearly establishes that the State did not

*The People have designated themselves as Respondent and will be referred to as such throughout this Reply Brief.

have to prove the element of intent beyond a reasonable doubt to gain a conviction for the crime of murder" (Respondent's Brief, p. 12). Respondent makes the astounding claim that intentionally firing a gun which results in a person's death is, without more, murder in Maine and manslaughter in New York (Respondent's Brief, p. 16). This contention is, quite simply, not true. Under both the New York and Maine homicide schemes the killing of another person with the intention to cause death is murder and must be proven by the prosecution beyond a reasonable doubt, and only if so proved is the jury to consider the distinction between murder and manslaughter. *Mullaney v. Wilbur*, 421 U.S. 684, 685 n.2, 686 (1975); *State v. Lafferty*, (Me.) 309 A.2d 647 (1973); Charge of the Court in *Patterson* (A. 79).* A corollary to this is that under Maine law (at the time of the *Mullaney* decision) where the mitigation defense is not put in issue, the defendant is not entitled to a manslaughter charge. *State v. Inman*, (Me.) 350 A.2d 582, 585, 586 (1976). Respondent in fact states that the trial judge in *Mullaney* charged that an intentional and unlawful homicide is murder unless the defendant proved the mitigating factor (Respondent's Brief, p. 15).

Essential to Respondent's claim is the erroneous view that malice aforethought under the Maine rule is a distinct substantive element of intent that the state is relieved of proving because the defendant must negate this element by proving heat of passion. (Respondent's Brief, p. 13). This argument misses two essential and related points made clear in *Mullaney*. First, malice aforethought in Maine law is not a substantive element of intent, but flows from proof by the State of an intentional killing. This Court in *Mullaney* thus described malice aforethought as "wholly unnecessary" (421 U.S. at 686 n.4) and "surplusage" (Id. at 693, n.15); *see also*, 421 U.S. at 685 n.2, 686, 688, 689 n.9, 690 n.10, 694. The concomitant point

*A refers to the separately bound Appendix filed with this Court.

missed by the People's argument is that malice aforethought and heat of passion are inextricably linked — two sides of the same coin — and malice aforethought is merely an affirmative statement of a negative condition (i.e. the absence of heat of passion). Thus, nothing turns on the fact that Maine had a (positive) name for the absence of heat of passion while New York does not.* This Court in *Mullaney* stated the issue before it no less than four times in the course of the opinion and on all occasions referred only to the presence or absence of heat of passion as the critical issue. 421 U.S. at 684-85, 692, 696 and 703.

In sum, the "critical fact in dispute" (421 U.S. at 701) under the Maine and New York homicide rules is the mitigation factor, the presence or absence of which distinguishes murder from manslaughter. The mitigation factor is set into bold relief in New York because it is the distinguishing factor between the two distinct crimes of murder and manslaughter while Maine claimed to have only one generic offense of homicide with separate punishment categories.

POINT II

State Court Litigation On The *Mullaney* Rule Has Had A Salutary Effect.

Respondent claims that a reversal of Appellant's conviction will lead to "endless litigation" concerning the constitutionality of various affirmative defenses, and cites numerous such defenses in New York (Respondent's Brief, p. 12). Appellant submits that administrative considerations cannot provide the answer to the question of whether or not a conviction has been

*The case cited by the Respondent at page 11 to bolster this view in fact explicitly supports the view that in Maine malice aforethought is a "policy presumption" rather than a substantive element of intent. *United States ex rel. Castro v. Regan*, 525 F.2d 1157, at 1160 (3rd Cir. 1975), *cert. denied*, U.S. , 19 Cr. L 4067 (1976).

unconstitutionally obtained. Moreover, once the major affirmative defenses such as entrapment, self-defense and the felony-murder defense are explicitly dealt with by this Court, in one or more opinions, the major outlines of the scope of *Winship* and *Mullaney* should be clear. Thus, *Mullaney* need not be the source of endless litigation.

Moreover, litigation at the lower court level on a case by case (i.e. defense by defense) basis may have the salutary effect of clarifing the issues involved in each defense. An example of this is what has occurred in Maine after *Mullaney*. The Maine Supreme Judicial Court has recently held that it is a violation of the Due Process Clause to place the burden of persuasion upon the defendant of the entrapment defense. *State v. Matheson*, (Me.) 363 A.2d 716 (1976). On the other hand, in another post-*Mullaney* case the Maine Court upheld placing upon the defendant the burden of persuasion of the insanity defense. *State v. Melvin*, (Me.) 341 A.2d 376 (1975).*

Mullaney is also causing lower courts to take a searching and independent look at rules which shift the persuasion burden in criminal cases. In *State v. Matheson, supra*, the Supreme Judicial Court relied on the reasoning of its own pre-*Mullaney* decision in *State v. Millet*, (Me.) 273 A.2d 504 (1971).**

*The Delaware Supreme Court has similarly analyzed in light of *Mullaney*, two affirmative defenses placing the persuasion burden on the defendant. It struck down shifting to the defendant the persuasion burden of the affirmative defense to murder of extreme emotional distress (*Fuentes v. State*, (Del.) 349 A.2d 1 (1975)) and upheld placing on the defendant the persuasion burden on the insanity defense (*Rivera v. State*, (Del.) 351 A.2d 561 (1976); *appeal dismissed sub nom. Rivera v. Delaware*, U.S. , 45 U.S.L.W. 3279 (1976)).

**In *Millet*, the Maine Court held that the prosecution must bear the persuasion burden on the issue of self-defense, because otherwise a jury of laymen could be confused by being presented with what are in essence conflicting burdens in the same case.

Another important development in Maine after *Mullaney* is that the production burden (as opposed to the persuasion burden) is taking on renewed significance. In *State v. Inman*, (Me.) 350 A.2d 582, 586, 587 (1976) the Maine Supreme Judicial Court held that since a defendant in a murder trial did not meet the production burden on the provocation issue, the prosecution was relieved of any burden on that issue.

The *Inman* case demonstrates that holding a defendant to a production burden on a given defense can mitigate the claimed hardship on the prosecution in meeting the persuasion burden. If the defendant does not produce "some evidence" on the issue the prosecution has no actual burden. Moreover, if a defendant does produce "some evidence" such production is likely to be "all evidence" the defendant has at his disposal on the issue.* In this latter situation, the question is not hardship of proof but how laymen on a jury are told to assess that proof. *Speiser v. Rundall*, 357 U.S. 513, 520, 521 (1958).

Imposing a production burden on a defendant suggests that in most cases a state has a device at its disposal to mitigate a claimed "unique hardship" of proof, 421 U.S. at 702, n. 31; *see generally*, Ashford and Risinger, Presumptions, Assumptions and Due Process: An Overview, 79 Yale L.J. 165 (1969); *see also*, Perkins, Criminal Law, 49-51 (2d ed. 1969).

Thus Maine is coping with *Mullaney*. Where the persuasion burden is shifted the courts are analyzing and scrutinizing each situation. Where a persuasion burden is found unwarranted, a production burden may nevertheless remain upon the defendant.

*The *Patterson* case is a good example. Patterson produced eleven witnesses who testified to his relations with his wife plus a psychiatrist whose testimony was uncontroverted. *People v. Patterson*, 39 N.Y. 2d 288, 292, 304 (A-97, A-113).

POINT III

The Insanity Cases Do Not Control This Appeal.

Respondent argues that the insanity cases should control this appeal (Respondent's Brief, p. 17). Appellant submits a reversal of Appellant's conviction need not pre-judge any other affirmative defense cases, and particularly need not affect or be affected by this Court's rulings with respect to the burden of proving insanity.

Unlike insanity, and like heat of passion, extreme emotional disturbance necessarily relates to the facts of the crime in that the very raising of the defense places the defendant at the scene of the crime and admits the fatal act. Insanity on the other hand is usually unrelated to the facts of the crime. Thus in a given case, dissimilar evidence can be used to prove the crime and to prove insanity.* Insanity is also radically more subjective and amorphous in its actual proof than extreme emotional disturbance because the major source of proof of insanity is the defendant's mind and not external things and events from which a jury may draw inferences.** Nor is insanity anchored like extreme emotional disturbance to an ultimate causal standard of a reasonable explanation or excuse. The effect of these unique questions of proof involved in the insanity defense (such that in 1969 — seventeen years after *Leland* — 24 states still require the defendant to prove the defense)*** justifies separate scrutiny by this Court.

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*This is in tandem with the view that non-responsibility for a crime due to insanity, is a separate issue from the question of guilt or innocence of that crime. Unique hardship in proving insanity is thus only relevant if *Winship* and *Mullaney* are viewed as encompassing facts going to responsibility for, as well as to guilt or innocence of a crime.

** The *Patterson* case demonstrates this difference. The trial judge charged the jury:

> "What actually happened here is clear, although there are some minor discrepancies between the stories told from the witness stand." (A. 73)

***Comment, 30 La. L. Rev., 117 n.l., 118 n.2 (1969).

POINT IV

Mullaney Should Be Applied Retroactively, At Least To Cases On Direct Appeal.

This Court has already granted certiorari and remanded for reconsideration in light of *Mullaney* four cases involving convictions and state appellate decisions prior to the day *Mullaney* was handed down. *Sparks v. North Carolina*, U.S. , 96 S.Ct. 3213 (1975); *Wetmore v. North Carolina*, U.S. , 96 S.Ct. 3213 (1975); *Burko v. Maryland*, 422 U.S. 1003 (1975); *Castro v. Regan*, 422 U.S. 1003 (1975).* In fact, *Castro*, like *Mullaney* itself, reached this Court by way of collateral attack. It would appear that this Court does regard *Mullaney* as retroactive.

Appellant has already argued that because *Mullaney* affects the very integrity of the fact finding process, it should be applied retroactively without consideration of the factors of reliance by law enforcement authorities or the effect on the administration of justice. *Williams v. United States*, 401 U.S. 646, 653 (1971).

Assuming *arguendo* that these latter factors are relevant it should be pointed out that, at least with respect to the mitigation to murder defense, only a minority of jurisdictions place the persuasion burden on the defendant, 421 U.S. at 696; Appendix A to Appellant's Brief. Further, even these jurisdictions will not have to consider murder convictions unless the mitigation defense was "properly presented" (421 U.S. at 704).** In fact, these few affected jurisdictions in these limited

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*These cases were affirmed on remand. *Burko v. State*, 28 Md. App. 732, 349 A.2d 355 (1975); *cert. denied sub nom. Burko v. Maryland*, U.S. , 45 U.S.L.W. 3400; *Castro v. Regan*, 525 F.2d 1157 (3rd Cir. 1975), *cert. denied*, U.S. , 19 Cr. L. 4067 (1976).

**In New York, this would only date back to 1965 when the Penal Law was revised.

situations will have an option to reduce the murder convictions to manslaughter, without re-trying the cases. Thus, the effect on the administration of justice need not be great.

CONCLUSION

For the reasons stated in Appellant's Brief and Reply Brief, it is respectfully submitted that the decision of the New York Court of Appeals should be reversed and a new trial should be ordered.

Dated: February, 1976

Respectfully submitted,

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(affidavit of service omitted in printing)

CORRECTION

Footnote 21 on page 33 of Appellant's Brief should read:

[21]The *Patterson* majority, 39 N.Y.2d at 301, A.109, stated that "the Model Penal Code does not, expressly state that the burden of establishing mitigating circumstances is upon the Defendant." It should be pointed out that the structure of the Model Penal Code is such that the burden shifts to a defendant only when the Code "plainly requires" this. Model Penal Code, Proposed Official Draft, §1.12(2)(b) (1962). Thus, not expressly stating that the burden is on the defendant to prove extreme emotional disturbance *is* stating that the persuasion burden does not shift.